Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation	)))))	MM Docket No. 92-266

RESPONSE OF CONTINENTAL CABLEVISION, INC. TO PETITIONS FOR RECONSIDERATION

Robert J. Sachs
Howard B. Homonoff
CONTINENTAL CABLEVISION, INC.
The Pilot House
Lewis Wharf
Boston, MA 02110
(617) 742-9500

Paul Glist
COLE, RAYWID & BRAVERMAN
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750

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RESPONSE OF CONTINENTAL CABLEVISION, INC.

Continental Cablevision, Inc. submits these comments in response to the Petitions for Reconsideration filed by Programming Providers, EWTN, Public Interest Petitioners and NATOA. Continental is the third largest multiple system operator in the United States and serves nearly 3 million basic subscribers.

SUMMARY

Continental agrees with Programming Providers, EWTN and Public Interest Petitioners that the existing going forward rules fail to create adequate incentives for program diversity and cable system expansion. The formula which limits regulated revenue increases to 7.5% of program cost plus 1¢, would leave established programmers insulated from the launch of new, competing, low cost networks; would compel cable systems to drop low cost programming, no matter the quality; would deprive operators of the necessary revenues to pay for system rebuilds; and more than anything else would create a permanent disincentive to improve and extend either systems or programming. Furthermore, the cost of service alternative

suggested by the Commission is insufficient to offset this limiting benchmark approach: the regulations expect rebuilds to be financed and placed in service while there is uncertainty over what those cost of service rules will provide; conditioned on the likely need for approval of each segment of the network, community unit by community unit, and tier by tier; and through procedures which were intended as primarily a backstop to benchmark regulation, not the rule for every system. Clearly, as these three petitioners suggest, the Commission needs to substantially revise its current going-forward formula.

Continental supports many of the suggestions raised in reconsideration, and offers a compelling alternative in the form of a Margin Incentive Plan. Because the Commission has determined that rates produced by the benchmarks are reasonable, it follows that the margins on programming carried on those systems must also be reasonable. To maintain this balance, Continental proposes that the Commission authorize operators to recover on each new channel added to a regulated tier (1) the programming cost for the added service plus (2) the operator's average margin on programming on that tier. Continental believes that such a Margin Incentive Plan would provide operators with adequate financial incentives to add new channels and rebuild systems, while protecting consumers and treating low cost, high cost, new and established programmers equally.

Consider hypothetically an operator with 20 CPS (Cable Programming Service) channels priced at $10.00 and a current direct programming cost of $4.00. The average margin on each of the 20 channels is ($10.00-$4.00)/20, or 30¢. Under the Commission's current formula, a 46 channel system adding one new 10¢ channel would be entitled to 10¢ + 0.75¢ + 1¢ = 11.75¢. But under the Commission's own benchmarks for this system, the reasonable margin would be 30¢. Under Continental's proposal, the operator would be entitled to 10¢ + 30¢ = 40¢. This proposal carries forward margins which the benchmark structure deems to be reasonable; makes use of existing information from the Form 1210; and puts high and low cost programmers on equal footing. Most importantly, it will provide legitimate incentives for cable operators to improve and expand existing regulated tiers, and will provide new programmers with an environment in which they have a reasonable chance to succeed.

On another subject, NATOA's petition is a formula for looking back to previously decided issues that the Commission has reasonably and clearly decided. For example, the Commission should reject NATOA's efforts to reargue the rules of franchise externals and franchise fees. The Commission's present rules assure that local governments retain political accountability for local taxes, fees and assessments on cable, and for the costs of meeting the demands of local cable franchises. They require that benchmark rates be calculated net of franchise fees to develop a core rate which can then be advertised on a fee-plus basis in the mass media across jurisdictional lines. The same core rate must be itemized under the customer service rules, with equipment and franchise fees broken out on an unbundled basis which conforms with advertising. NATOA's proposals to ban such advertising and bury the line itemization in a footnoted legend would defeat political accountability and upend this careful balance among complementary rules. In Continental's view, NATOA's professed concern over the calculation of franchise fees is an effort to rewrite franchise agreements, and not a genuine concern with the FCC's present rules.

Likewise, NATOA's request to limit the recovery of franchise externals if they are not associated with express dollar signs in the franchise does not comport with franchising reality, in which the exact price of an access studio or an institutional network is often not known when the franchise is executed. Nor does it square with the goals of political accountability or the Commission's stated preference for benchmark rather than cost-of-service regulation.

Finally, the Commission should maintain the mechanics of refunds as they are, in the hands of cable operators under the guideline of federal rules. Franchising authorities should not be authorized to retain or to delay refunds to the cable operators of the franchise fees paid on amounts operators are required to refund.

DISCUSSION

I. The Commission Should Adjust the Going Forward Rules to Accommodate New Channels and Rebuilds

A. The Existing Rules Provide No Incentives for New Programming or System Rebuild

As the Programming Providers, EWTN and the Public Interest Petitioners (collectively referred to herein as "Going Forward Petitioners") suggest, the Commission needs to create a new structure to provide legitimate "going forward" incentives for cable operators and programmers.[1] Continental agrees with these Petitioners that the elements of the current going forward structure lack appropriate financial incentives.

In the first instance, the going forward rules provide an "incentive" of a 7.5% margin on newly launched networks. Yet some of the nation's most popular cable networks were first launched with no programming charge to cable operators in order to attract initial penetration and to build long-term audience loyalty. The networks did so even when there was little or no competition from rival cable networks. Such a strategy is even more likely today for new programmers such as Ovation, which face a daunting list of successful, well established networks. Offering initial no-cost programming should be one way to get easier initial distribution. But under the current going forward rules, the launch of such new networks is virtually impossible, because 7.5% of zero is still zero for the cable operator.

The rules also seek to provide compensation for non-programming costs, but offer virtually no recovery of network launch costs such as marketing and promotion and no compensation for the capital committed to build the channel capacity consumed by launch. A cable operator such as Continental, with an average of 46 regulated channels, receives only 1¢ per subscriber per month for each newly launched channel.[2] Many large markets are served by more than 46 regulated channels. Over 95% of cable subscribers are served by systems with

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[1]See also T. Ferguson, Viewers Hurt as Cable Gets a Double Dose, *Wall Street Journal*, June 14, 1994, A15.

[2]The 1¢ mark-up would be more than offset by the operator's subscriber notification costs alone.

channel capacity leading to no more than 2¢ compensation for an additional channel.[3] In a limited channel capacity world in which the only real way to expand programming is to build additional channel capacity, the formula fails to offer any incentive for the capital investment to undertake that expansion.

A second concern, as Public Interest Petitioners note, is that a cable operator who only adds programming to a regulated tier may be faced with a new complaint and be dragged into an increasingly costly, demanding, and unpredictable regulatory process. That uncertainty alone erects a barrier to the launch of new networks.

A third problem arises from the procedural delays built into the system of recovering increases in external costs. Although recent "questions and answers" have helped to reduce the lag time between adding a channel and recovering its costs,[4] there remains a troubling delay in recovering any externals from basic service rates. Programming must actually be added to basic service before it becomes eligible for external treatment, but no increase in basic service programming costs may be passed through until the Form 1210 is filed *and the local franchising authority approves the increase.* Between notice requirements and the "tolling" mechanism which has been applied to basic rate increases, there can be five or more months delay. Thus, programmers seeking carriage on basic are confronted with a universe of cable operators

[3]Source: Warren Publishing, Television & Cable Factbook at I-69 (1994).

[4]The "Questions and Answers" of June 14, 1994, for example, permit services added at the end of a quarter to be included on the next Form 1210.

uncertain how much, if any, of their programming costs will be recovered from basic rates, and no mechanism for recovering the programming costs incurred while awaiting local approval.

The consequences of this formula are numerous and extremely serious to cable operators, programmers and consumers.

- As discussed above, there is no incentive to add low cost (i.e., new) networks.[5] Existing dominant programmers are effectively entrenched in perpetuity against new competition. Those programmers who want to launch free or at low cost will simply not be launched, while cable operators will have little inclination to pay high costs for any new, unproven programming networks. This will have the unintended consequence of inhibiting the statutory purpose of promoting diversity in programming.

- By applying the same going-forward formula to channel deletions, the incentives work against improving programming offerings. For example, the flip side of the formula is that the deletion of a free or low cost channel results in a rate decrease of only 1¢ in systems with more than 46 channels. Every operator in major markets, serving the vast majority of the population, is strongly motivated to drop low cost networks from regulated service and replace them with premium channels. The Commission could not have intended to precipitate such a shift.

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[5]There is also very little financial incentive to add high cost networks. For example, a new network which costs an operator 50¢ would produce less than a nickel for the operator.

- The current formula provides no basis to pay for a system rebuild. Continental has previously demonstrated that a typical upgrade from 450 MHz to 550 MHz requires more than $2.00 in new revenues per subscriber per month.[6] Providing for only a 1¢ per channel "network" cost obviously fails to consider the extent of this cost, and would thus defeat the statutory purpose of promoting system expansion.

- Even the incentive to add high cost programming is problematic under the formula, because even without rebuild, the cost to *launch* a new channel includes purchase and installation of headend equipment, marketing and promotion and extensive customer notices, in addition to programming. These costs are not even addressed by the Commission's formula, yet can easily exceed the 7.5% plus 1¢ , particularly in small systems.

- The only going forward alternative offered by the Commission—cost of service showings—is impractical for a variety of reasons. First, according to the cost of service rules, one must rebuild plant and place it into service *before* one can get a local and/or Commission cost of service ruling on whether and how much of the rebuild will be included rate base. The Commission has yet to develop the final rules on which that decision will be based, thus providing no solid basis for predicting a return to the investment community on the financing of those rebuild costs. Second, the Commission

[6]Comments of Continental Cablevision on Third Notice of Proposed Rulemaking, MM Docket 92-266 at 14-15 and associated spreadsheets (Sep. 30, 1993).

apparently expects each cost of service showing to be conducted on a community unit by community unit basis, with the FCC ruling on the effect of the rebuild on tier costs, and each local government passing on the effect of the rebuild on basic service in its local franchise area. This approach is a hindrance to the widespread upgrading and rebuilding of cable infrastructure on anything approaching a regional or national basis. Third, by requiring cost of service for every channel addition or upgrade, the Commission has forced an overwhelming burden on operators and regulators: only those operators who are content with the state of their systems' as they stood in September 1992, and never seek to improve them, may rely on the benchmark system which is supposed to be the primary scheme of regulation. Those operators who wish to improve service and help build the information highway must prosecute a complex, time consuming cost of service case, when Congress specifically sought to avoid Title II regulation of cable. Yet if the benchmark going-forward formula remains as it is, complex cost of service will become more commonplace. This was not the intent of the 1992 Cable Act.

B. Continental Proposes a Margin Incentive Plan, Providing a Markup Equal to Embedded Margins on Regulated Programming

A number of creative suggestions have emerged in ex parte and on reconsideration which would provide the type of legitimate going-forward incentives the Commission appears to be seeking.

Continental concurs with the view of the Going Forward Petitioners that the Commission's present formula poses a realistic and substantial threat to program diversity. The solution offered by the Public Interest Petitioners is commendable: system rebuild costs should be afforded external cost treatment; new networks should be assigned a "constructive" rate (as detailed below); the addition of a channel to regulated service, without more, should not trigger a rate complaint; and, just as with increases in Cable Programming Service externals, increases in basic service "externals" should be allowed on 30 days notice, subject to later adjustment and refund if and when the franchising authority concludes a rate proceeding.

Continental respectfully submits that the "constructive rate" may be adopted as the logical extension of the Commission's own rules. If the rates produced by the benchmarks are reasonable, as the Commission has concluded, then programming cost margins embedded in those rates must also be reasonable. There is no need for the Commission to set a fixed margin for all systems or to assume that the margin needed in one market is necessarily required in another. All the Commission need do is authorize operators to recover on each new channel added to a regulated tier (1) the programming cost for the added service plus (2) the average margin on programming costs on that tier.

Consider hypothetically an operator with 20 CPS channels priced at \$10.00 and a current direct programming cost of \$4.00. The average margin on each of the 20 channels is (\$10.00-\$4.00)/20, or 30¢. Under the Commission's current formula, a 46 channel system adding one new 10¢ channel would be entitled to an additional 10¢ + 0.75¢ + 1¢ = 11.75¢. But under the Commission's own benchmarks for this system in this market, the reasonable margin would be 30¢. Under Continental's Margin Incentive Plan, the operator would be entitled to 10¢ + 30¢ = 40¢, a far more reasonable incentive to take the necessary steps to add a channel with new programming.

A sample (modified) Form 1210 is attached to illustrate the ease of this adjustment.

This plan offers a number of significant advantages:

- It carries forward the margins which the Commission has found reasonable for existing operators. The margin to the operator is always the margin already adjudged reasonable for this system by the Commission's benchmark formula.

MODULE B: CALCULATING CURRENT & NET EXTERNAL COSTS

Line	Line Description	a Basic	b Tier 2	c Tier 3	d Tier 4	e Tier 5
	Current External Costs					
B1	Current Programming Costs					
B1a	Cost of Old Programming per Tier		$40,000.00			
B1b	Cost of Pgming. Shifted from other Tiers		$0.00			
B1c	Cost of New Programming per Tier		$1,000.00			
B1d	Cost of Pgming. Shifted to other Tiers		$0.00			
B1e	Cost of Pgming. Dropped from System per Tier		$0.00			
B1f	Total New Pgming. Costs per Tier [B1b+B1c]		$1,000.00	$0.00	$0.00	$0.00
B2	Current Retransmission Consent Fees		$0.00			
B3	Sum of New Pgming. & Retrans. per Tier [B1f+B2]		$1,000.00	$0.00	$0.00	$0.00
B3a	Cost of Old Programming Per Tier [B1a]		$40,000.00			
B3b	Revenue Per Tier [(A1*B9)]		$100,000.00			
B3c	Margins per Channel on Old Programming [(B3b-B3a)/C1]		$3,000.00			
B4	Margins on New Programming [B3c*C3]		$3,000.00	$0.00	$0.00	$0.00
B5	Total Pgming. & Retrans. Costs per Tier [B1a+B3+B4]		$44,000.00	$0.00	$0.00	$0.00
B6	Taxes per Tier		$0.00			
B7	Franchise Related Costs per Tier		$0.00			
B8	Total Current Ext. Costs per Tier [B5+B6+B7]		$44,000.00	$0.00	$0.00	$0.00
B9	Current Subscribers per Tier		10000.			
B10	Current Ext. Costs per Tier per Sub. [B8 / B9]		$4.40	$0.00	$0.00	$0.00
	Previous External Costs					
B11	Previous Programming Cost Adjustment for First Filing of FCC Form 1210					
B11a	Programming Costs per Tier from Form 1200		$40,000.00			
B11c	Subscribers per Tier as of 3/31/94		10000.			
B12	Retransmission Consent Adjustment for your Form 1210 Filing for the period including October 6, 1994					
B12a	Previous Retransmission Consent Fees per Tier		$0.00			
B12c	Previous Number of Subscribers per Tier		10000.			
B13	Previous Ext. Costs per Tier per Sub. [See Instructions]		$4.00			
B14	Adj. Prev. Ext. Costs		$4.00			
	Change in External Costs					
B15	Net External Costs per Tier per Sub. [B10-B14]		$0.40	$0.00	$0.00	$0.00

MODULE A: TRANSITION RATES AND FULL REDUCTION RATES FROM PREVIOUS FILING OF FCC FORM 1200 OR FCC FORM 1210						
		Basic	**Tier 2**	**Tier 3**	**Tier 4**	**Tier 5**
A1	Transition Rate per Tier (Previous)	$8.00	$10.00			
A2	Full Reduction Rate per Tier (Previous)	$8.00	$10.00			

- It makes use of the specific margin information (price less cost) which is set forth in the Form 1210 for each operator. It uses existing information to calculate a margin which the Commission's rules have found reasonable for each specific tier in each specific community.

- It eliminates the problem that "7.5% of zero is zero." By decoupling the markup from a percentage, the Commission can avoid penalizing newer networks that are using a no or low cost strategy to gain distribution. Continental's Margin Incentive Plan puts high cost programmers and low cost programmers on an equal footing, while requiring operators to charge less for low cost channels and permitting them to charge more for high cost channels.

All of the above suggests that the Commission has before it a number of thoughtful Petitions which enunciate the problems of the current going-forward formula. But there is a very viable alternative as suggested by Continental, consistent with the ideas raised by the Going-Forward Petitioners, which would provide the real-world incentives for program innovation that would benefit subscribers must of all.

II. The Commission Should Reject NATOA's Efforts to Avoid Political Accountability

A. The Existing Rules Accommodate Political Accountability; Benchmark Rate Calculations; Advertising in Mass Media; and Customer Service Line Itemization Requirements

Continental urges the Commission to reject the suggestions of NATOA to resurrect a series of proposals already considered and rejected by the Commission. NATOA's proposals are merely a continuation of its ceaseless effort to avoid political accountability by local governments. It has revived the previously rejected claims that (1) franchise fees should not be itemized in advertising; (2) franchise requirements for PEG support should not be itemized on the bill; (3) costs to meet franchise requirements should not be recovered through externals; and (4) franchise authorities should be permitted to keep the franchise fees paid on refunded charges.

The Commission's present rules assure that local governments retain political accountability for local taxes, fees and assessments on cable, and for the costs of meeting the demands of local cable franchises. Political accountability is specifically envisioned and required by the 1992 Act. Section 622(c) permits the operator to itemize the franchise fee, and the name of the franchising authority on subscriber bills as an attempt to impose some political accountability on franchising authorities. As the FCC has stated:

> We understand that the purpose of Section 622(c) is to assure that there are no regulatory obstacles placed in the way of cable systems identifying certain governmental imposed costs on subscriber bills. ... Section 622(c) has to do with increasing political accountability for regulatory costs imposed by permitting subscribers to be informed that a portion of their bills are related to governmental imposed obligations. As Senator Lott stated in introducing the eventual final version of Section 622(c) as an amendment to the Senate bill:
>
> > I would like to offer my amendment ... dealing with subscriber bill itemization, to give the cable companies an opportunity to itemize these so-called hidden costs to explain to people what is involved in the charges so they will know it is not just the cable company jacking up the prices ....
>
> ...[W]e underscore that the policy of Section 622(c) is to permit subscribers to be fully apprised of the effect of the enumerated governmental imposed costs on their bills. It would of course frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to avail himself of the rights bestowed by this Section, or otherwise attempted to nullify the effect of a Section 622(c) itemization through local regulations.

Report & Order in MM Docket 92-266, 8 F.C.C.Rcd. 5631 at ¶¶ 545, 551-52 (1993).

In addition to political accountability, the Commission rules challenged by NATOA assure that cable operators will be able to operate in multiple jurisdictions and comply with both the benchmark rate-making scheme and the customer service rules. The FCC's Form 393, which governs the setting of "benchmark" cable television rates, specifically requires cable operators to remove franchise fees from cable television revenues in calculating maximum permissible rates. It then requires the fees to be added onto that maximum rate in order to determine the total amount for which the subscriber is to be invoiced. In the Forms 393 and 1200 instructions governing derivation of the rate, for example, the FCC states: "Franchise fees have been excluded from this analysis in order to compare your monthly rate for the basic service tier to the maximum permitted level. Whether you itemize or not, *any franchise fees for the basic service tier should be added to your monthly rate* as part of the service when billing your subscribers." The latest rules continue to differentiate between adjustments to "permitted charges", which may be adjusted quarterly for other externals, and increased franchise fees, which are "calculated separately as part of the maximum monthly charge per subscriber . . ." 47 C.F.R. §76. 922(d)(3)(viii).

Because franchise fees so often vary among jurisdictions, operators seeking to use the media to market cable services need the flexibility to advertise rates at the benchmark derived "core rate" plus franchise fees. As Continental has previously reported,[7] its Dayton, Ohio area system is managed and operated on an integrated basis for 160,000 subscribers, yet it is franchised in 58 different communities (with differing franchise fee structures) ranging in size from 200 to 60,000 subscribers. Requiring dozens of different prices to be quoted for an integrated system, as NATOA's proposal would mandate, would spawn massive confusion, because local newspapers, radio and television traverse franchise boundaries. That would needlessly fractionalize marketing. By comparison, the FTC permits advertisement of rates exclusive of taxes even when it has required disclosure of all mandatory and unavoidable service charges.[8] Sporting events, concerts, airlines, automobiles, restaurant promotions, and goods sold

[7]Petition for Reconsideration of Continental Cablevision in MM Docket 92-266 at 17-18 (June 21, 1993).

[8]See, e.g., Dollar Rent a Car, Inc., FTC Docket C-3421 (March 29, 1993).

through national or regional advertising often specify a price exclusive of applicable taxes. It is the only way to do business efficiently on a regional basis while assuring that consumers receive accurate rate information.

Such advertising is also consistent with the level of itemization mandated on the subscriber bill. The customer service rules require operators to breakout bills into line items for basic, equipment, premium, and so forth.

> Bills must be fully itemized with itemizations including, but not limited to, basic and premium services changes and equipment changes.

47 C.F.R. § 76.309(c)(3)(ii)(A).

A typical itemized bill presents the subscriber with a full itemization of his services and of the franchise fee. A sample (from a jurisdiction which charges franchise fees on revenues collected on total gross revenues including franchise fees) would look like this:

8/15	Beginning balance	21.05
8/25	Payment	21.05-
9/16-10/15	Basic Service	8.00
9/16-10/15	Cable Prog'm Service	10.00
9/16-10/15	Converter/Decoder	2.00
9/16-10/15	Franchise fee	1.05
9/15	Total for Cable Service	21.05

The sample bill above breaks out franchise fees as a separate line item, exactly like equipment fees, which is then totalled into a total amount due for cable service. This is consistent with the Commission's instructions on line itemization; with the underlying *"policy of Section 622(c) ... to permit subscribers to be fully apprised of the effect of the enumerated governmental imposed costs on their bills;"* with the instructions on Forms 393 and 1200 on how to compute and establish rates by adding franchise fees onto the end result; with the Congress' definition (in 47 U.S.C. § 542(a)(i)) of franchise fees as a tax; with the customer service rules' demand for fully itemized bills; and permits subscriber bills to agree with advertising campaigns in the mass media.

Rejecting the NATOA proposal is therefore necessary in order to conform to the Commission rules on advertising, bill itemization, and benchmark calculations, and the statutory goal of political accountability.

B. The Amount of Franchise Fees Due is Adequately Defined in Local Franchise Agreements

Continental believes that NATOA's stated concern over the calculation of franchise fees is misleading. Some franchise agreements exclude from the definition of "gross revenues" (on which franchise fees are paid) the amount collected to pay the franchise fee itself. On the other hand, other franchise agreements specifically include those amounts, thus collecting a franchise fee on the franchise fee. Franchises thus vary widely in the definition of "gross revenues" on which fees are assessed, a diversity which the Commission itself has acknowledged in its rate regulations. 47 U.S.C. § 76.924(e)(4). In those markets collecting a fee on the fee, the form of invoice shown above fully pays the franchise fee. In those markets which assess fees only on the core charges, the franchise fee amount would show as $1.00, rather than $1.05. There is no pressing need or statutory directive for the FCC to become embroiled in these issues, which are merely a matter of interpreting local franchises. And there is no basis for NATOA to try to leverage the FCC's rules into a de facto preemption of franchise definitions of "gross revenue."

C. NATOA's Proposal to Hide Franchise Fees Would Evade Accountability and Defeat Other Statutory Goals

When the Commission last addressed this issue, it warned franchising authorities not to frustrate its effort to carefully balance the variety of concerns in the area of franchise fee itemization:

> [L]isting such charges "below the line" would tend to confuse subscribers regarding what is or is not a part of their bill. Thus, any bill itemized pursuant to Section 622(c) may require only one payment for the operator's services on the part of a consumer, the total for which must include all fees and costs itemized pursuant to Section 622(c). ... The language of the Act expressly permits the itemization of certain governmental imposed costs. Beyond the guidelines given above, we are refraining from dictating how a cable operator choosing to itemize may format its bill and implement Section 622(c). ... It would of course frustrate the intent of the statute if a franchising authority imposed burdensome additional itemization on an operator choosing to avail himself of the rights bestowed by this Section, or otherwise attempted to nullify the effect of a Section 622(c) itemization through local

regulations.

Report & Order in MM Docket 92-266, 8 F.C.C.Rcd. at ¶¶ 551-52.

In Continental's view, NATOA's requested change would abrogate all of these rules and frustrate the policy of political accountability. It professes to conform with instructions of the House Report. But the House Report fundamentally commands that franchise fees not be listed *below the line* which totals the charge for cable service. The House report cannot be read to forbid any line itemization of the franchise fee, because such a reading cannot be squared with the express language of the Act: "Each cable operator may identify ... as a separate line item ... the amount of the total bill assessed as a franchise fee," 47 U.S.C. §542(c). Nor can a prohibition on itemization comport with the companion customer service regulations or with the mechanics of benchmark rate regulation.

D. NATOA's Proposal to Prohibit Recovery of Franchise Externals Would Evade Accountability and Frustrate Benchmark Rate Regulation

Continental views NATOA's efforts to limit the amount of externals as unfounded in policy or law. The Commission's benchmark rules are calculated without regard to the costs of new franchise requirements. Whether or not they are line itemized as "PEG" expenses is fundamentally immaterial.[9] They must be recovered, and they must be disclosed at a minimum

[9]NATOA's efforts to exclude certain costs for PEG related expenses does not square with the realities of franchising. In renewal negotiations, franchising authorities routinely justify the wiring of municipal buildings as necessary in order to deliver PEG access channels.

in the rate adjustment notice, so that customers will know the cause of the rate increase. When franchises are renewed, the parties often do not know the exact price which every franchise requirement will entail. If the requirement is to build a public access studio or municipal institutional network, the fact that the price is not enumerated in the franchise does not make the costs any less real. Indeed, NATOA's proposal to exclude such unenumerated costs is nothing more than a formula for franchising authorities to be inexact in franchises in order to avoid political accountability. It would also force each operator to resort to cost-of-service to recover franchise externals. If a franchising authority does not believe that specific costs may be appropriately recovered on a 1210, it may argue the point on the facts of each specific case. But there is no basis in the record for excluding vast categories of costs *a priori* from recovery as externals.

E. The Mechanics of Refunds Should be Left to Cable Television Operators

NATOA's request to control the refund mechanism would undermine the refund mechanism itself. It is presently and logically within the judgment of the cable operator how to mechanically provide for refund. If the refund to subscribers is in a lump sum, the franchising authority should provide for simultaneous refund (plus interest) to the operator of the franchise fees paid on the refunded amount. If the subscriber refund is staggered in some fashion, then the refund of franchise fees can be similarly staggered. But there is no justification for the Commission to provide the franchising authority the right to refuse or delay refund of the franchise fees they have collected on refunded overcharges. Such discretion invites local governments to avoid the very political accountability which the Act and rules have sought to assure.

CONCLUSION

Continental shares the view of a number of Petitioners that the current going forward rules create a permanent disincentive to improve or extend cable systems and effectively preclude the launch of new cable networks. The alternative presently on the books—cost of service regulation—remains too uncertain to overcome these impediments, and would turn procedures intended primarily to serve as a backstop to benchmarks to become the rule for every system seeking to upgrade service or add new channels. The alternative to the 7.5% markup offered by Continental would authorize operators to recover on each new channel added to a regulated tier (1) the programming cost for the added service plus (2) the average margin on existing programming carried on that tier, which has already been found reasonable for that specific system and tier under the benchmark scheme. This Margin Incentive Plan relies on information already embedded in the Form 1210; is tailored to each system; places low cost, high cost, new and established networks on an equal footing; and provides reasonable incentives for programmers and operators to fulfil the statutory goals of expanding service and enhancing programming diversity.